No. 6462

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and THOMAS WINKLER, *Appellants,*

—vs.—

ANDREW F. MAHONY COMPANY, a Corporation, and FIDELITY-PHOENIX FIRE INSURANCE COMPANY, a Corporation, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

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Solicitors for Appellees.

THE ARGUS PRESS, SEATTLE

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ABBREVIATIONS

Tr. will be used to denote the printed Transcript.

Test. will be used to denote the testimony introduced before the Deputy Commissioner and certified under stipulation with other exhibits in the case to this court.

St. will be used to denote "A Study of Longshore Earnings in Washington Ports" (Employer's and Insurance Carriers' Exhibit No. 3) certified under stipulation with other exhibits in the case to this court.

UNITED STATES
CIRCUIT COURT OF APPEALS

Ninth Circuit

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and THOMAS WINKLER, *Appellants,* —VS.— ANDREW F. MAHONY COMPANY, a Corporation, and FIDELITY.-PHOENIX FIRE INSURANCE COMPANY, a Corporation, *Appellees.*	No. 6462

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF CASE

This is an appeal in equity from a judgment of the United States District Court for the Western District of Washington, Northern Division, enjoining an award of the Deputy Commissioner for the Fourteenth District created under the Act of Congress of March 4, 1927, known as the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C.A. 901-50. The sole question presented by this case is the determination of the basis of compensation to be paid an injured employee under the above Act. The em-

ployer paid the appellant, Mr. Winkler, compensation on the following basis: The actual annual earnings of Mr. Winkler for the year immediately preceding the date of his injury (Aug. 8, 1930), were $1,266.20. This sum was divided by 52, making his actual weekly earnings for the year immediately preceding his injury $24.35 per week. Two-thirds of this figure, amounting to $16.23, was paid by the employer as Mr. Winkler's compensation during his disability. Appellant appealed to the Commissioner and the Commissioner granted compensation at the rate of $25.00 per week, or slightly in excess of his average weekly earnings, and considerably in excess of the $16.23 compensation rate as fixed by his employer. *It will be noticed that the Commissioner's award paid Mr. Winkler more when he was disabled than he earned when working.* The lower court set aside the $25.00 award and allowed $16.23 per week as compensation. Mr. Winkler has appealed from this decision which appears in 46 Fed. (2nd) 539.

SECTION OF STATUTE INVOLVED
(33 U.S.C.A. 910)

"Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole

of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee *can not reasonably and fairly be applied,* such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, *shall reasonably represent the annual earning capacity* of the injured employee in the employment in which he was working at the time of the injury.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured empolyee was a minor when injured, and that under

normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages." (Italics ours)

Act of March 4, 1927, c. 501, Section 10, 44 Stat. 1431.

The Deputy Commissioner arrived at his $25.00 a week compensation by applying (b), above. The employer on the other hand (c), above. The District Court approved the application of (c) and the appellees are here seeking to affirm its decision.

COMMISSIONER'S FINDINGS

The Commissioner's findings (Tr. 7), after establishing the injury and certain other jurisdictional facts, thereafter established the following: The actual earnings of the claimant for the 3½ years immediately preceding his injury were as follows:

1927	$1163.16
1928	1286.63
1929	1406.29
(Average $1285.00)	
1930 (1st 6 mos. to time of injury	620.87

For the year or 12 months immediately preceding his injury his earnings were $1266.20; during the year immediately preceding his injury claimant was disabled by illness for about 10 days, otherwise, through this period he followed solely the employment of a longshoreman, reporting to the place of employment as frequently as required, "being willing, and ready to undertake all work as a longshoreman offered to him." He worked on an hourly wage 182 days

or parts of days during the year immediately preceding his injury. The Deputy Commissioner then found that Mr. Diegnan is a workman engaged as a longshoreman in the port of Seattle and that he is an employee of the same class as the claimant; that during the year immediately preceding the injury, Mr. Diegnan worked 284 days and earned a total of $2,-314.45, or an average of $8.15 per day during the days so employed. The Deputy Commissioner then computed compensation under section (b) of the Act above quoted as follows:

"300×$8.15=$2,445.00.

$2,445.00÷52=$47.02 per week."

2/3 of this amount equals $31.25 a week.

This being in excess of the maximum amount allowed by the Act, $25.00 per week only was thus awarded.

The following uncontroverted facts with regard to Mr. Winkler were also established at the hearing, but were not the subject of specific findings by the Deputy Commissioner. He had worked for some 25 years on the Seattle waterfront (Test. 3), and was 48 years old (Test. 4). He and Diegnan were both members of the so-called "extra-board" (Test. 5). He was qualified as a longshoreman to perform all acts connected with the industry with the possible exception of driving a double winch (Test. 5). The record showed that Mr. Winkler had worked fairly regularly considering the average days worked by longshoremen. His record was a very good one and indicated that he was around most of the time looking for work (Test. 4), the longest interval between working being some 12 days (Test. 13).

SUMMARY OF GENERAL FACTS OF THE LONGSHORE INDUSTRY

A longshoreman is one who follows the craft of stowing and discharging cargo into or from the hold of a ship. Such workers generally include both dock and ship workers, but in the port of Seattle the term generally refers to those who work off shore, the shore group being usually known as dock workers or truckers (Test. 19). Longshoremen for the general part work interchangeably for the various water-front employers of a port. This is explained by the extreme irregularity of the work, which work depends to a great extent upon the arrival and departure of vessels (Test. 19-20). The longshoremen in the port of Seattle are dispatched to work through a central "hall", where employers place their orders for men. The "hall" in turn either calls the men by telephone or dispatches them to the various jobs as they report to the "hall" for orders (Test. 20).

Longshoring work is generally carried on by fixed units or gangs composed ordinarily of some 10 men, thus divided: One foreman (hatch tender); one double-winch driver; two sling-up men, and 6 hold men. Longshoremen in the port of Seattle are divided into three general groups, as follows:

1. *Registered gangs.* Registered gangs are permanent units of the character above mentioned. They work together steadily and are dispatched for work on the basis of low earnings gang first. This plan is adopted to equalize as far as possible the earnings of these men, who are the most favored and are on the average the highest earning group (Test. 20, 37).

2. *"Extra-board"*. Winkler and Diegnan fall in this group. These men are used for replacements of absentee regular gangmen and as additions to existing gangs when more than 10 men to the gang are needed and when extra gangs are made up after registered gangs are all dispatched to work (Test. 20).

3. *Registered Casuals* are the last group and the last arrivals on the water-front. This group is the reservoir from which the first two groups are selected when a joint committee of men and employers decide new men are needed in the higher groups (Test. 19-20).

Although registered gangs are as a group the highest earners, still some "extra-board" men exceed the earnings of the gangs. There is much more disparity between members of the "Extra-board" than between members of the registered gangs, as the earnings of the latter are as far as possible equalized over the years; whereas, this is impossible in the case of "extra-board" men (Test. 37).

There is no daily, weekly, monthly or annual wage in longshoring. All men work at an hourly wage, which is normally 90c an hour and $1.35 an hour over-time (Test. 7, 44). Over-time is really a misnomer, as the so-called over-time in longshoring is really a penalty rate for night work. It has nothing to do with work in excess of eight hours. This is illustrated by the fact that if a man started work during the night and continued through into the daylight hours of the following day, irrespective of the number of hours worked, after 8:00 A.M. his wage would lower to the daytime rate (Test. 21-22).

In support of the contention of the employer that the actual earnings of Mr. Winkler during the past year "reasonably and fairly" represent his annual earning capacity in the longshoring industry, the appellees introduced before the Deputy Commissioner considerable statistical data on the industry. This data is collected from the complete earning records which have been kept in Seattle since 1921 and in Everett since 1925 and in all other Washington and Oregon ports since the passage of the Compensation Act. It is believed no other large ports in the country have kept such earnings records (St. 4-5). Data on the three-year period coinciding roughly with the period of the Compensation Act was introduced. *"Only those men are included in the tables who did not lose as much as a month in any one of the three years through sickness, accident or other causes."* It was the desire to make this study a fair representation of longshoremen's earnings, unaffected by loss of time other than the discontinuousness of the work. The above is not true of the record of Everett earnings, which included men who did lose some time if they otherwise worked fairly steady throughout the year. The tables for Everett were prepared in this fashion and appellees did not have time to have them changed to correspond with the other tables in time for the hearing (Test. 25). Dock workers whose earnings are less than ship workers were not included (Test. 24). Throughout, the effort was made in the preparation of the statistical tables to make the information a fair representation of what steady longshoremen will actually earn (Test. 24).

These tables found on Pages 16 and following in the so-called "Study of Longshore Earnings in Washington Ports" (Employers' and Insurance Carriers' Exhibit 3) establish the following facts and conclusions:

1. Only 15% of the longshoremen in the state of Washington, as set out in these tables, earned $1,-950.00, or more, per annum on the average for the three years the Act has been in effect, and therefore, only 15% of those most regularly employed in the state of Washington would be entitled on the basis of actual earnings to the maximum of $25.00 per week allowed by the Deputy Commissioner in the present case. ($1,950.00÷52=$37.50x2/3=25.00.)

2. 60% of these most regularly employed longshoremen in this state, as developed by the tables in evidence, actually earned between $1,300.00 and $1,-950.00 per annum on the average for the three years the Act has been in effect. Thus payment of the $25.00 weekly rate allowed in the instant case would pay these men during disability from 66 2/3% to 100% of their full actual earnings.

($1,300.00÷52=$25.00x2/3=$16.66 2/3
$1,950.00÷52=$37.50x2/3=$25.00)

3. 25% of the longshoremen in the state of Washington earned per annum on the average for approximately the first three years of the Act less than $1,-300.00. At the compensation rate of $25.00 per week, uniformly allowed by the Deputy Commissioner in all cases presented to him since the case of *Gunther v. United States Employees' Compensation Commission*, 41 Fed. (2d) 151, referred to at length hereafter, one-

fourth of the longshoremen in this state would thus be paid in compensation, *while incapacitated more than they earned while at work. It will be particularly noticed that this is the situation in the present case.*

4. An examination of the tables shows noticeable differences in earnings of men, even though only those men who worked reasonably steady in the occupation are included in the tables.

5. In the vast majority of cases the earnings of men are amazingly consistent from one year to another. A low man one year is, in the majority of cases, low the next. A high man one year is correspondently high the other years. This clearly indicates what employers and representatives in "dispatching halls" know; namely, that individuals have an "annual earning capacity" of a definite character.

Some individual statistics were introduced which are quite enlightening:

The earnings record of M. Diegnan, the banner man of the port of Seattle, who was used by the Commissioner as the yardstick by which to measure Mr. Winkler's compensation, is analyzed on page 16 of the Study (St. 16).

Earnings during 1929, $2,314.45.

Worked 284 days or parts of days; approximately 75% day-time and 25% night-time.

Highest number of days worked in any one month —27.

Lowest number of days worked in any one month—21.

Length of job varied from 1 to 15 hours.

Worked for 18 companies in the course of the year.

The extreme irregularity of the length of the working day of a longshoreman is illustrated in his case by the fact that of the 284 days worked, only 38 were worked from 8:00 A.M. to 5:00 P.M.

A. D. Lancour (St. 18) indicates similar characteristics of the employment. It will be noticed that this record was kept by the man himself and checked almost perfectly with the "hall" record.

The record of S. Hanson, the banner man of Everett, indicates the same characteristics (St. 20-21).

Tacoma has produced the highest earner ($3,058.85) in the state of all who work in the hold of the ship. He worked 307 calendar days, or parts of days, a total of 2,662 hours. His percentage, 43.6, of night-time work is unusual and is accounted for by the fact that Zeppi, after working day-time, would frequently take a night job as well. He was what would be termed a "job hog" (St. 22A and B). *Mr. Zeppi is the only longshoreman in the state of Washington who worked 300 days or more in the year 1929* (St. 24).

The highest number of days or parts of days worked by longshoremen in the various parts of the state are as follows:

Tacoma, A. Zeppi, 307.

Seattle, M. Diegnan, 284.

Everett, S. Hanson, 269 (St. 16, 22B).

Longshoring is thus not a 300-day per year industry.

A chart of the earnings and days worked by two men from each of the six Pacific Lighterage Corporation regular gangs, shows annual earnings for 1929

ranging from $1,684.77 to $1,783.15, and the number of days or parts of days worked in 1929 from 243 to 275 (St. 26). These gangs are steadily and exclusively employed by the Pacific Lighterage Corporation. Their gang earnings are slightly below the "hall" gang earnings discussed below, but they are above the average (Test. 23-24).

The potential earnings of the "hall" gangs for 1929 averaged $1934.00, just below the $1950.00 per annum necessary to attain the maximum weekly compensation of $25.00 per week. These potential gang earnings are compiled by adding what each "gang" man would earn if he worked on every job throughout the year to which this gang was dispatched. Nearly all men necessarily miss some time and do not work every time the gang works (St. 65). Therefore, the actual individual earnings of gang members are, in the great majority of cases, below the potential gang earnings. The average of the *actual earnings* of the gang members for the year 1929 was $1761.00, or almost $200 below the *potential* gang earnings. The potential gang earnings are compiled as a basis for dispatch of gangs, so that they may be dispatched in the order of low earnings gang first. The earnings of the gang are thus equalized over a year and run very evenly (Test. 26). *It will, therefore, be noticed that the earnings of the gang men who are considered group No. 1 and who are on the average the highest earners in the port, potentially and actually fall below the figure which would entitle them to $25.00 compensation per week.* These figures are based on 1929 which was a very good year in longshoring (Test. 31).

On page 69 of the Study, a chart is given which shows that even the *potential* earnings of these registered gangs from 1924 throughout the first six months of 1930 in two years (1926, 1927) only, passed the $1,950.00 per annum mark. This chart further substantiates the fact that 1929 was a representative year.

On page 80 of the Study, the method is given which was employed in Seattle for computation of compensation from August 3d, 1927, until the Deputy Commissioner changed the method to comply with what he believed to be the ruling of this court in *Gunther v. United States Employees' Compensation Commission*, 41 Fed. (2d) 951. It will be carefully noted that time lost from illness, injury, disease, or leave of absence are all considered "time out."

> "Allowance is always made for lost time, so that the prior twelve months, or the twelve months immediately preceding the injury, is not taken blindly, but the earnings of those twelve months is divided by the actual numbers of weeks worked, not by 52 if less than 52 weeks were worked. The purpose of that, of course, is to ascertain the real earning capacity, the net capacity affected by lost time."

As a practical matter, loafing and slack work are the chief non-deductible time items in estimating earnings. The following pages in the Study illustrate the method used to arrive at earnings figures for "casuals" or "floaters" (St. 81-82).

The testimony above outlined, we believed, shows a careful approach to the problem of determining

earnings in the manner believed contemplated by this Act. *Only by such knowledge of the industry can we determine whether an individual workman's actual annual earnings "fairly and reasonably" represent his earning capacity in that industry.* From the passage of the Act until the *Gunther* decision, a longshoreman's actual earnings, if they "fairly and reasonably" represented his earning capacity in the longshoring industry, were used as a basis upon which compensation was paid and the United States Employees' Compensation Commission specifically approved the method (St. 73, 74) (Test. 27, 28, 32).

QUESTION INVOLVED

The question here involved, as suggested above, is simply whether a workman's "annual earning capacity" as a longshoreman is that sum which really represents "fairly and reasonably" what he himself can earn in a year in that industry, or whether his "annual earning capacity" must be based on what might be termed his theoretical earnings as reflected by the earnings of the highest longshore earner in the port.

Mr. Winkler was paid compensation at a rate which is a fair average of his actual earnings under normal conditions for the past few years. The figure for compensation fixed by the Deputy Commissioner is based upon the earnings of one of the highest earners in the port. Appellant contends that he was fit, ready, willing and able to work at all times and that, therefore, he must be paid compensation as though work had always been available for him and as though he

had always accepted it. The District Court answered this contention in its able opinion as follows:

> "Earning capacity means fitness and readiness and willingness to work considered in connection with opportunity to work, and the fitness and the opportunity must go hand in hand. Claimant was ready and fit and the risk of opportunity was his."

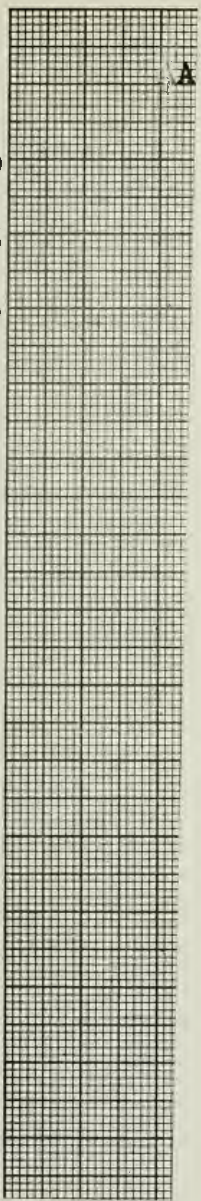
The quotation in clear language expresses appellees' contention.

The payment of compensation to injured employees is based upon earnings in all but three workmen's compensation acts in this country, which three use the so-called family statutes. The rate of compensation under the longshoremen's act is 66 2/3% of earnings. This is the standard in practically all "liberal compensation laws". The most advanced champions of adequacy of compensation propose 75% of earnings. The loss of 1/3 of a man's earning capacity when injured is the incentive used to accelerate his return to work. It is a universal principle of compensation acts (Test. 40).

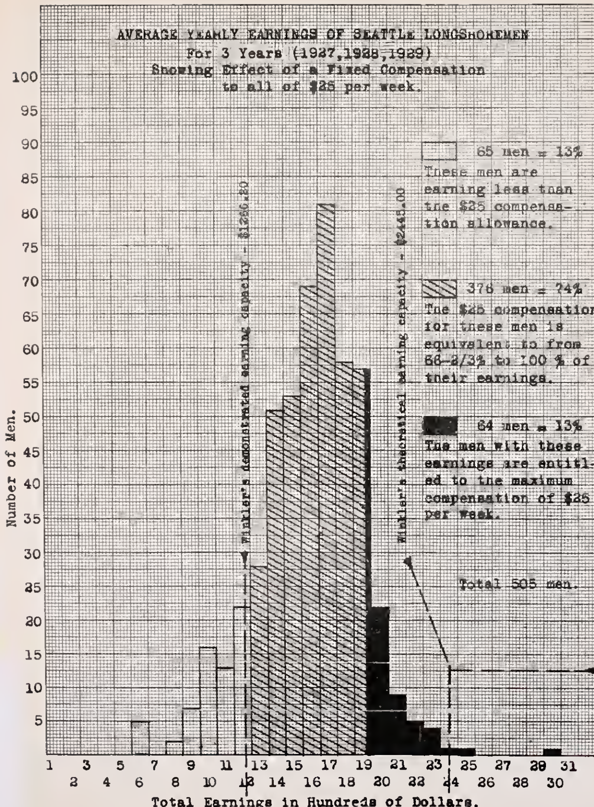
The construction here sought by appellant utterly destroys the principle of compensation based on earnings and would supplant that principle with a flat weekly rate of compensation for every man in the port, regardless of his ability, skill, desire to work and such other pertinent elements.

The chart reproduced facing page 16 clearly shows the absurdity of the result here urged by the appellants. The Findings of the Commissioner (Tr. 7-9) show that Mr. Diegnan, the highest earner in

the port of Seattle, actually earned $2314.45 for the twelve months immediately preceding the date of Mr. Winkler's injury. As pointed out above, he is considered the highest representative earner among the men who worked in the hold of the ship at the normal wage rate (Test. 22). The Deputy Commissioner has divided these actual earnings of Mr. Diegnan, $2314.45, by 284, making an average daily wage of $8.15 for the days actually employed by Mr. Diegnan. He then multiplies this figure by 300 days, arriving at the sum of $2445.00, which he fixes as the "annual earning capacity" of Mr. Winkler. As a result of this mathematical legerdemain, the Deputy Commissioner has found as the theoretical annual earning capacity of Mr. Winkler a figure *higher than the highest earner in the port.* The chart on the facing page clearly points out the practical result of such mathematical magic. The theoretical earning capacity of $2445.00 thus fixed for Mr. Winkler has only been equalled or passed in the port of Seattle in the three years for which statistics have been produced in this city by three men out of the 505 men whose earnings figures are there reproduced; also, it is important to note that all three of these men were *foremen* and as such were receiving 10c more an hour above hold men, such as Mr. Diegnan and Mr. Winkler (St. 29). The practical result of the Deputy Commissioner's Finding is to give every man who is injured, irrespective of his actual annual earning capacity, the maximum of $25.00 per week allowed by 33 U. S. C. A. 906.



A
100
95
90
85
80
75
70
65
60
55
50
45
40
35
Number of Men.



AVERAGE YEARLY EARNINGS OF SEATTLE LONGSHOREMEN
For 3 Years (1927,1928,1929)
Showing Effect of a Fixed Compensation
to all of $25 per week.
100
95
90
85
80
75
70
65
60
55
50
45
40
35
30
25
20
15
10
5
Number of Men.
65 men = 13%
These men are earning less than the $25 compensation allowance.
378 men = 74%
The $25 compensation for these men is equivalent to from 66-2/3% to 100 % of their earnings.
64 men = 13%
The men with these earnings are entitled to the maximum compensation of $25 per week.
Total 505 men.
Winkler's demonstrated earning capacity - $1256.20
Winkler's theoretical earning capacity - $2445.00
This line is the theoretical earning capacity of all Seattle longshoreman as computed in the Winkler case by the Deputy Commissioner. Actually only 3 longshoremen in the port earned this amount, all 3 of them foremen.
"The greatest of all scientific tragedies - an hypothesis slain by a fact."
1 3 5 7 9 11 13 15 17 19 21 23 25 27 29 31
2 4 6 8 10 12 14 16 18 20 22 24 26 28 30
Total Earnings in Hundreds of Dollars.
F.P.F.
8/7/30.

ARGUMENT

Longshoring has been frequently judicially recognized as a peculiar industry and one requiring special consideration on account of the irregular, unusual and casual character of the work involved.

In *Perry v. Wright* (1908) 1 K. B. 441, Lord Justice Fletcher Moulton said:

> "The workman was a casual dock laborer and there is no dispute as to the rate of payment which such workmen obtain during the time they are employed, but the employment is a casual one. The men go to the stand and are taken on for a job and when that job is over they are discharged and remain idle for a time, or get engaged by some other employer who needs workmen."

See

> *Snell v. Mayor of Bristol* (1914) 2 K. B. 291;
>
> *Cue v. Port of London Authority* (1914) 3 K. B. 892.

Gillen v. Ocean Accident, 215 Mass. 96, 102 N. E. 346, L. R. A. (1916A) 371, where the court emphasized that the usual provisions of the Compensation Act refers "to substantially uninterrupted work in a particular employment", and that longshoring was not such an industry.

Employer's Liability v. Figroid, 3 Calif. Compensation Commission Reports, page 46 (1916) where the head-note says:

> "After a thorough investigation it has been found that stevedores, a great many of whom do

not work anywhere near 275 days *because of the peculiar nature of their employment*, have an annual earning capacity of an average of $1040."

Mahoney v. Marshall, 46 Fed. (2d) 539. Here the court in the present case said:

> "While the finding is that claimant was subject to call, ready and willing and able to work, but that he was not called, the record shows that the work was necessarily discontinuous, dependent upon certain conditions interminable in advance because of lack of employment. * * * This from the record appears to be a fixed condition. It is an incident of this employment of which the claimant was advised and the claimant took the risk of the recognized incidents as to work in normal conditions and consideration must be given to that normal equation. This is not an employment of 'clock' or 'whistle', but of recognized intermittance with the element of discontinuousness."

Luckenbach v. Marshall, 49 Fed. (2d) 625, where Judge McNary in a longshoreman's case arising at the port of Portland similar to the one at hand said:

> "It clearly appears from the record that the work of the claimant, as carried on at the port of Portland, was irregular and discontinuous. Frequently reporting to the place of his employment, and readiness and willingness to work, did not give claimant's employment the characteristics of steadiness. Willingness to work, without the opportunity, does not increase one's earning capacity."

Nelson v. Pillsbury, 48 Fed. (2d) 883;
Pacific Steamship Company v. Pillsbury, 1931, A. M. C. 1243 (not yet officially reported).

Longshoring has thus been frequently recognized as a peculiar industry and one which will not adapt itself to the usual provisions of compensation acts.

APPLICABILITY OF NEW YORK DECISIONS

The Longshoremen's and Harbor Workers Compensation Act was borrowed practically without change from the New York Act, and the section under discussion and above quoted is found in like form in section 14 of the New York Act.

The New York decisions under this act have therefore great weight in the present case.

In *Texas Employer's Insurance Asso. v. Sheppeard*, 32 Fed. (2d) 300, 1929 A. M. C. 776, the proper construction to be placed on section 8, subsection 22 of the Longshoremen's & Harbor Worker's Act was under discussion. The court said:

> "Not only is the language of Sec. 22 in my opinion as a matter of first impression, capable of no other construction, but the courts of New York, from which the provision was taken verbatim, have construed it that way, and it is a fundamental rule of statutory construction that the adoption of a statute of another state which has been construed in the courts of that state, carries that judicial construction with it in the adopting state.
>
> "Congress enacted this Compensation Act on

March 14, 1927. At that time the courts of New York, passing upon this identical clause, had given the statute the construction which its terms plainly demanded. A brief review of those decisions is of interest."

" * * * If Congress, which has adopted the New York Act and the construction which the New York courts have put upon it, desires to change the statute so as to avoid either the language or the construction placed upon it by the New York courts, it may do so, but until it does so the Commission must administer the Act as it is written, and as it has been interpreted, and not under an arbitrary rule conceived by it to be more beneficial than the one prescribed by statute."

See

Mahony v. Marshall, 46 Fed. (2d) 539.

In *Brown v. Walker*, 161 U. S. 591, at 601, the court said:

"This is but another application of the familiar rule that where one State adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the State from which they are taken."

So again in *Willis v. Eastern Trust and Banking Co.*, 169 U. S. 295 at 307, the court said:

"The resemblance between the provisions of the Massachusetts statute of 1860, and of the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the

former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded. *Tucker v. Oxley*, 5 Cranch, 34, 42; *Pennock v. Dialogue*, 2 Pet. 1, 18; *Metropolitan Railroad v. Moore*, 121 U. S. 558, 572; *Warner v. Texas & Pacific Railway*, 164 U. S. 418, 423. In *Metropolitan Railroad v. Moore*, just cited, procedure, had been incorporated by Congress, in substantially the same language, in the legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted those provisions as then understood in New York and already construed by the courts of that State, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia."

Where the language of a statute is borrowed from another jurisdiction, it is presumed that it was taken with the meaning it had there.

Henrietta Mining & Milling Co. v. Gardner, 173 U. S. 123.

NEW YORK DECISIONS

The New York courts have held that the section of the New York Act corresponding to Section (c) of 33 U. S. C. A. 910, which the appellees contend is applicable to the longshoring industry is applicable to seasonal industries.

McDonald v. Burden, 201 N. Y. S. 420 (iron puddler);

Gruber v. Kramer Amusement Co., 202 N. Y. S. 413 (Sunday helper on a coaster railroad of an amusement corporation);

Kittle v. Town of Kindehook, 212 N. Y. S. 410 (highway repairer);

Deverso v. Parsons, 225 N. Y. S. 78 (vegetable and fruit picker);

Blatchley v. Dairymen's League, etc., 232 N. Y. S. 437 (ice harvester).

So again, when an industry does not supply continuous regular work throughout the year, section (c) must be used to determine compensation to employees.

Remo v. Shenandoah, 179 N. Y. S. 46;

Rooney v. Great Lakes, 180 N. Y. S. 653 (irregular workman);

Belliamo v. Marlin-Rockwell Corp., 213 N. Y. S. 85 (employee working sometimes five, sometimes four days per week);

Geroux v. McClintic-Marshall, 233 N. Y. S. 402 (structural steel worker, working 192 days in the preceding year);

Littler v. Fuller, 233 N. Y. 669, 119 N. E. 552 (bricklayer).

Which of sections (a), (b) or (c) of section 10 of the Longshoremen's Act will apply to a given industry or case is a question of fact under the New York decisions to be determined from all the applicable testimony.

Adams v. Boorum & Peace Co., 166 N. Y. S. 97;
Shaw v. American Body Co., 178 N. Y. S. 369.

Section (c) is applicable to piece work.

Shaw v. American Body Co., 178 N. Y. S. 369.

Only earnings in the employment in which the injured man was working at the time of injury may be considered in determining earning capacity.

McDonald v. Burden Iron Co., 201 N. Y. S. 720;
Kapler v. Camp, 213 N. Y. S. 160;
Deverso v. Parsons, 225 N. Y. S. 78;
Blatchley v. Dairymen's League, 232 N. Y. S. 437.

(The New York Act has since been changed to include earnings from other employments embraced by the Compensation Act, *Orlando v. Snyder*, 246 N. Y. S. 234, but the Federal Act remains the same.)

Section (c) may apply to other than seasonal industries when sections (a) and (b) cannot "reasonably and fairly" be applied.

Gruber v. Kramer Amusement Co., 202 N. Y. S. 413;
Littler v. Fuller, 233 N. Y. 669, 119 N. E. 554.

The New York cases lay down another fundamental principle of compensation acts; namely, *that compensation must never exceed actual earning capacity.*

In re Cohen, 162 N. Y. S. 424;
Remo v. Shenandoah, 179 N. Y. S. 46;

Rooney v. Great Lakes, 180 N. Y. S. 653;

Roskie v. Amsterdam, 181 N. Y. S. 891.

The policy of the New York workmen's compensation act is to give us compensation not to exceed two-thirds of earnings.

Fredenburg v. Empire, 154 N. Y. S. 351;

Roskie v. Amsterdam, 181 N. Y. S. 891, where the court said:

> "The award should be reversed, and the matter sent back to the State Industrial Accident Commission, to adjust the compensation upon the basis of all weekly earnings of the claimant or his representative employee. * * * *The award should not exceed two-thirds of the earning capacity.*" (Italics ours)

Littler v. Fuller, 223 N. Y. 369, 119 N. E. 554, where the court said:

> "The award should not exceed two-thirds of the earning capacity."

The 300-day multiplier of the first two sections of 33 U. S. C. A. 910 cannot "fairly and reasonably" be applied to an industry with a 7-day week nor to an industry of a 5-day week.

Prentice v. N. Y. State Railways, 168 N. Y. S. 55 (a 7-day week), where the court said:

> "The number 300, used in those subdivisions, is not an arbitrary selection, but was evidently selected because it bears an approximately close relation to the number of working days in a year, Sundays and holidays excluded. Manifestly, where an employee works seven days a week for

substantially an entire year, the method of determining his average annual earnings, indicated in either subdivision 1 or 2, would be an injustice to him, just as much as *it would be an injustice to the employer to apply those subdivisions to a case where the injured employee has worked less than six days a week for a substantial period of time.* The claim here falls more appropriately within subdivision 3 of the section, which provides for a case where 'either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied.' The commission properly determined that this claim falls within subdivision 3."

Remo v. Shenandoah, 179 N. Y. S. 46 (a 5-day week).

Actual earnings in the absence of unusual features such as time lost may measure "earning capacity" in a particular industry.

In re Cohen, 162 N. Y. S. 424, where the court said:

"*The effort of the commission should have been to determine the average weekly wages of the claimant in accordance with the facts, and according to the conditions as they actually existed,* and not according to some theoretical conditions, which, had they existed, might have increased the earnings of the claimant. * * * There should be a finding in accordance with the facts as to the average weekly wages of the claimant, and that should be made the basis of the award." (Italics ours)

Gruber v. Kramer, 202 N. Y. S. 413, where the court said:

> *"Under subdivision 3, if he has worked the entire season, his earnings may measure his annual earning capacity in this employment."*

Littler v. Fuller, 223 N. Y. 369, 119 N. E. 554, where the court said:

> *"If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the proper basis of compensation."*

Remo v. Shenandoah, 179 N. Y. S. 46, where the court said:

> "There is not in the record proof of the previous earnings of other employees of the same class in the same or almost similar employment, *but we have the proof of the actual earnings of the claimant*, and it may reasonably be found that this represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident."

Of course, weekly wages cannot be used as a *sole* criterion of "annual earning capacity", but they must be shown to fairly represent the "annual earning capacity" of the injured employee.

RULE IN OTHER JURISDICTIONS

The rules above laid down by the New York courts have been followed to a great extent in other jurisdictions. See *Mehaffey v. Industrial Accident Commission* (Calif.) 171 Pac. 298, where the employee was a roof cleaner, whose work was intermittent. Here the court said:

> "Both subdivisions 1 and 2 contemplate a kind of employment which is permanent and steady, and which, for that reason, affords to an employee the possibility, at least, of earning annually an amount measured by the number of working days in a year, estimated and fixed by the act at 300. Where this kind of employment is not shown to exist, the case falls within subdivision 3, under which the annual earnings are to be taken as the sum which will 'reasonably represent the average annual earning capacity' of the employee 'in the kind of employment in which he was then working, or in any employment comparable therewith, but not of a higher class'. Under this subdivision, the amount of annual earnings is not reached by multiplying the employee's daily earnings by any arbitrary figure, but by ascertaining from the evidence what his earning capacity in fact was."

Andrejwski v. Wolverine Coal Co. (Mich.) 148 N. W. 684. The earnings of a coal miner were under discussion. The record showed no mining district runs or is ever run 300 days in a year. Sales, weather conditions and other elements were involved. Mines

were conducted on an average of 211 days each year. Miners were paid on contract by the ton. The deceased, the year before his death, had worked 131 days and had done some outside work. The Act was quite similar to the New York and Federal Acts. The court said:

> "(*4*) *To charge this employment with compensation for injuries to its employees on the same basis as employments which operate during substantially 300 days in the year would be an apparent injustice, as such compensation would be based on the theory of impossible earnings by the employee in that employment which operated upon the average a trifle over two-thirds of a working year. This was recognized and provided for by the Legislature by omitting from the fourth classification any requirement relative to the average daily wage or salary of an injured employee. This construction, in principle, appears to be supported by the English cases involving quqestions of like character. Kelley v. York*, 43 Irish L. T. J. 81; *Bailey v. Kenworthy*, 98 L. T. R. 333, 334; *Carter v. John Lang & Sons*, 16 Sc. L. T. 345-348; *Anslow v. Cannock, Chase Colliery Co.*, 100 L. T. 786." (Italics ours)

See also

State Road Commission v. Industrial Commission (Utah) 190 Pac. 544 (intermittent road work);

Utah Fuel v. Industrial Commission (Utah) 201 Pac. 1034 (coal mining averaged 210 days per year);

Petroleum Casualty Company v. Williams, 15 S. W. (2d) 553 (300-day multiplier inapplicable to industry with 7-day week).

OTHER FEDERAL CASES

The instant case is the first of four test cases to reach this court. Each of the four cases involves substantially the same questions as are presented. Four lower Federal courts of Washington, Oregon and California have passed on the questions here involved since the change in the method of computing compensation following what we believe to be the Deputy Commissioners' erroneous interpretation of the decision of the court in *Gunther v. United States Employee's Compensation Commission*, 41 Fed. (2d) 151. In each case the award of the Deputy Commissioner was set aside by the court.

These cases frequently referred to in this brief are:

Mahony v. Marshall, 46 Fed. (2d) 539 (Wash.);

Luckenbach v. Marshall, 49 Fed. (2d) 625 (Oregon);

Nelson v. Pillsbury, 48 Fed. (2d) 883 (Calif.);

Pac. S. S. Co. v. Pillsbury, 1931 A. M. C. 124 (not officially reported).

In all four cases the lower courts have upheld the contention now urged by the appellees and have considered the *Gunther* decision as distinguishable and not controlling in the sense of not being an adverse ruling. In each of these cases the District courts have held that the testimony showed longshoring to

be a casual and irregular employment. All the District courts held that the application of Sections (a) and (b) of 33 U. S. C. A. 910 would lead to an unfair and unjust result and that, therefore, section (c) must be applied. In each case *actual known earnings* which reasonably represented the injured employee's "earning power" in the longshoring industry were taken as the basis for compensation. Where actual earnings were uncertain, earnings of some fellow workman in a similar earnings group were taken and the earnings of some exceptionally high earner, such as Mr. Diegnan in the instant case, uniformly selected as the yardstick by the Deputy Commissioner, were disregarded. These cases hold that:

1. Actual earnings, where known, which "fairly and reasonably" represent the "earning power" of a longshoreman in the longshoring industry are the basis upon which compensation under the Longshoreman's Act must be computed.

2. Where actual earnings are unknown or are in dispute or when they do not fairly represent a longshoreman's "earning power" in the longshore industry, then the earnings of longshoremen in the same earnings class or group will be considered. *Just because two workmen are longshoremen does not mean they are in the "same class" for the purpose of computing compensation.*

A recent New York case construing the New York Compensation Act, which, as pointed out, is almost identical in phrseology to the Federal Act, expresses the foregoing in very clear fashion.

Subdivision 3 of the New York Act, corresponding

to Section (c) of the Federal Act, was amended in 1928 (c. 54 Laws of New York 1928) to include earnings "in other employments as defined by the Act." Thus, under the New York Act an employee's earnings record is not restricted to the particular industry in which he was employed at the time of the accident. However, that is still the case under the Federal Act.

At the hearing in the case referred to above, *Orlando v. Snyder*, 246 N. Y. S. 224, evidence was introduced to show that 50c per hour was the average wage in New York State for unskilled labor, and compensation was based solely on such testimony. The court overturned the ruling of the Commissioner and held that such an arbitrary basis was improper, as it gave no consideration *to the individual's own earnings*. The court said:

> "*If his past earnings for the time concerning which the proof was given appear to be indicative of what he normally earned, there would be no reason to consider the earnings of other employees, but if for any reason the proof indicates that his actual earnings for that period were not fairly representative, consideration may be given other earnings of others who worked 'in the same or a neighboring locality'.*"

DEPARTMENTAL CONSTRUCTION

As heretofore stated, from the inception of the Act until the so-called *Gunther* decision, the construction now contended for by the appellees was in effect throughout the Pacific Coast and received the express approval of the United States Employers' Compensa-

tion Commission. The lower court so found and emphasized the fact.

In *Logan v. Davis*, 233 U. S. 613, at 627, the court said:

> "The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons."

Again in *U. S. v. Alabama*, 142 U. S. 615 at 621, the court said:

> "We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

See

Swendig v. Washington Co., 265 U. S. 322.

See also

U. S. v. Minnesota, 270 U. S. 181;
Texas Employers v. Sheppeard, supra.

THE GUNTHER CASE

The appellants rely chiefly on the case of *Gunther v. U. S. Employees' Compensation Commission*, 41 Fed. (2d) 151. A careful reading of that case, however, clearly shows that it does not support their contention and that it affirmatively supports the position which appellees are here urging. Mr. Gunther, a longshoreman in San Francisco, was killed under circumstances entitling him to compensation under the Longshoreman's Act. The Testimony showed that he had worked less than 200 days in the year preceding his injury and actual earnings of $892.00 for this period were proved. Based on this figure, the Deputy Commissioner awarded his widow compensation. The widow introduced testimony to the effect that the deceased had been employed as a stevedore for a number of years; that he supported her and her tubercular adult son; that he had no other source of income; that they paid $35.00 per month rent; that he worked steadily and that his earnings were not less than $40.00 per week. Another witness on behalf of the widow testified he had known the deceased a number of years; that they had worked together at different times, but not during the year before the injury; that they earned about the same amount; that he had earned during the year preceding decedent's death $2100.00. Another witness for the widow testified

he was a gang boss under whom decedent had worked; that decedent was a "hustler" and that he had steady employment and that his earnings would average $40.00 per week. The testimony of the widow also indicated other jobs where earnings records were not available that deceased could have worked and that decedent was daily on hand, ready for such employment. The court held actual earnings in the case of the decedent were "not controlling". That "his ability to earn" was the "primal basis of determinal compensation." That "the conclusion to be arrived at is a sum which 'shall reasonably represent the annual earning capacity' " of the deceased. The court held that manifestly $893.96 did not "reasonably represent the annual earning capacity" of the deceased, nor did it "approximately represent" the amount of wages which "an employee of the same class working substantially the whole" of the preceding year would earn. The court stressed the fact that loss of time through injury or accident might render his actual earnings an unfair test of his "earning capacity". There was no testimony introduced to show that the application of sections (a) or (b) would lead to an unfair or unreasonable result and thus the court applied (b). The court stressed the importance of actual earnings, but held that they were not conclusive and that "earning power" was the "ultimate fact to be determined."

In the decision, the following language is used:

> "It was clearly the purpose of Congress that, in case of the accidental injury or death of such employee during the course of his employment,

> *his ability to earn should be the primal basis of determining compensation.*"

Appellees submit that a man's "ability to earn" is essentially shown by his earnings under ordinary circumstances over a period of years.

The decision again says:

> "Where the award is made under subdivision (c), actual earnings are not controlling, but the conclusion to be arrived at is a sum which 'shall reasonably represent the annual earning capacity'."

Appellees agree that actual earnings are not controlling, as other features such as lost time must be considered, and that actual earnings are only controlling when they do "reasonably represent the annual earning capacity."

The decision emphasizes that an employee may have lost time through accident, and the testimony in this case clearly shows that this factor is considered in computing compensation under the system of usuing actual earnings as a basis for compensation. The court again says, speaking of lost time:

> "In such case his prior lack of earning or earning capacity, particularly the reason therefor, while a proper matter to be considered in determining his earning power at the time of the accident, nevertheless, it is *that earning power* which is the ultimate fact to be determined in the manner prescribed by the statute."

Appellees submit that a man's "earning power" in a certain industry is best shown by his actual earnings under normal conditions in that industry.

In the case of *Anslow v. Cannock* (1909) A. C. 435, one of the leading British cases under the 1906 Compensation Act, the facts were as follows: This act amended the act of 1897. The two-week waiting period was lowered to one week, and the oasis for determining wages was also lowered to a weekly computation. The act also provided that if an employee's work was too short or casual to fairly compute his earnings, then the earnings of another in the same employ for the past twelve months should be examined. In that case, the injured man worked for thirty-three weeks; there was no work for fourteen weeks; two weeks were a public holiday; two weeks he was ill, and one week he took a voluntary holiday. The court took into consideration that certain work was of a discontinuous character and emphasized the fact that this feature of employment must be reflected in earnings. The court said:

> "The object of the act, broadly stated, is to compensate a workman for his loss of capacity to earn which is to be measured by what he can earn in the employment in which he is under the conditions prevailing therein before and up to the time of the accident."

The court held that holidays and illness did not affect ability to earn,

> "* * * but, if it is a part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment and his capacity to earn is less over the year."

This case, decided in the British House of Lords, has been repeatedly referred to and quoted in Amer-

ican cases. Applying the decision to the *Gunther* case, in determining earning power, loss of time through illness and through taking a voluntary holiday does not affect the ability to earn and time so taken should not be used to lessen his average weekly wages. However, as indicated in the above case and as indicated in the case of *Littler v. Fuller*, *supra*, the "discontinuous" character of the work does cut down a man's "ability to earn".

We have no dispute with the result reached by the court upon the facts presented in that case, but wish to point out the following essential differences in that case and the one at bar:

1. In the *Gunther* case there was *no evidence* introduced to show that section (a) and (b) could not "reasonably and fairly be applied" to determine the decedent's earning capacity. Here the record overwhelmingly shows that such is the case.

2. The Record of the earnings of fellow workmen of Mr. Gunther were strongly indicative that his "actual earnings" did not fairly represent "his earning power" in the longshoring industry. Here, Mr. Winkler's earnings are comparable with a large group of fellow workmen.

3. The actual earnings of Mr. Gunther were affirmatively held by the court not to "reasonably represent his annual earning capacity". Here Mr. Winkler's actual earnings were taken for three years back and were very uniform and his last year's earning record was *affirmatively stated by him* to "fairly represent the amount of money earned" by him at longshoring the year before his injury (Test. 5 and 6).

The lower court has ably distinguished the *Gunther* case. Judge McNary likewise distinguished that case in *Luckenbach v. Marshall*, 49 Fed. (2d) 625. Judge Kerrigan in *Nelson v. Pillsbury*, 48 Fed. (2d) 883, and Judge Cosgrove in *Pacific Steamship Company v. Pillsbury*, 1931 A. M. C. 1243, did not consider that decision in any manner adverse to the position here urged by appellees.

OTHER SECTIONS OF THE ACT

Section 908 provides repeatedly that compensation shall be based on "two-thirds per centum of the average weekly wages". Other sections of the law provide for lesser percentages of the "average weekly wages" to widow, children, etc.

Section 908, sub. 21, provides, in cases of partial disability, that compensation shall be two-thirds per centum of the difference between "average weekly wages" and "his wage-earning capacity thereafter in the same employment or otherwise."

The primary purpose of the Act, like that of other similar Acts, is the fundamental principle that compensation, in case of injury, shall be based on a percentage of a workman's actual earnings in the industry, if such earnings fairly represent his earning capacity in that industry. This is in line with the universally recognized theory of compensation acts throughout the world.

> "A. Well, the practical human necessity that we are all under to have some incentive to work, or we won't, and the usual incentive to go back to work is the loss of a third of a man's earning

capacity when injured, in the form of compensation.

Q. Is this principle of paying compensation in case of injury and during incapacity of a sum less than the earnings a fairly uniform method of procedure under all compensation acts?

A. I don't know of anywhere that is not followed anywhere in the world, and the incentive is usually a third, and often-time more. The highest percentage of earnings advocated by the most liberal compensation students is seventy-five per cent of earnings.

Q. Which means a loss of 25 per cent of earnings during incapacity?

A. Yes, sir.

Q. As the incentive to return to work?

A. Yes." (Test. 40)

"Wages" and "earnings" technically have a different meaning. The former means the money rate at which work rendered is recompensed and the latter means the result of wage rate and time worked (Test. 44-5). The two terms, however, are used interchangeably in this Act.

Sloat v. Rochester, 163 N. Y. S. 904.

The entire language of the Act and the well recognized and universally accepted principles of compensation acts demand the construction here sought by the appellees. Appellees submit that the somewhat ambiguous wording of Section 10 should not overcome the declared basis of the whole Act and the universally recognized scheme of workmen's compensation.

In *Brown v. Duchesne*, 19 Howard 183 at 194, Chief Justice Taney said:

> "* * * And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning."

Again in *Pollard v. Bailey*, 20 Wallace 520 at 525, Chief Justice Waite said:

> "The intention of the legislature, when properly ascertained, must govern in the construction of every statute. For such purpose the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

To give a man in many cases compensation while injured more than his earnings while employed is obviously violative of every principle of workmen's compensation as universally recognized. To give injured workmen, during their period of incapacity, from 66 2/3% to 100% of the amount that they could earn in the industry when fully able to work is equally violative of the principles of the Longshoremen's Act.

SUMMARY

From the foregoing the following is clearly established:

I.

Sub-sections (a) and (b) of Section 910 of the Longshoremen's Act "cannot reasonably and fairly be applied" to the longshoring industry of the State of Washington, as sections (a) and (b) contemplate an industry furnishing employment daily throughout the year, whereas the longshoring industry as shown by the testimony, falls far short of furnishing such steady work.

To apply (a) and (b) to the longshoring industry would necessitate the payment of arbitrary and fictitious rates of compensation to employees violative of the letter and spirit of the Longshoremen's Act, and in short, every compensation act in the world.

We, therefore, respectfully submit that the compensation as paid in this case is a sum which reasonably represents a proportion of "the annual earning capacity" of the claimant, and, as such is the only fair compensation to be paid.

DISCUSSION OF APPELLANT'S ARGUMENT AND AUTHORITIES

Appellants have very courteously admitted that the figures contained in "A Study of Longshore Earnings" (Exhibit 3) are substantially correct. We concur in appellants' statement that much contained in the Study is not evidence and when the exhibit was introduced, the following statement was made:

"In introducing this in evidence, it will be

understood that the facts contained therein and the conclusions drawn therefrom will be considered as evidence and the argumentative matter will be merely considered as argument in support of Employers' and Insurance Carriers' contention."

The witness, Mr. F. P. Foisie, was carefully qualified as an expert, the evidence showing that for 10 years he had specialized in industrial relations in the longshore industry receiving a traveling fellowship under the Wertheim Foundation at Harvard University, which enabled him in 1926 and 1927 to make an intensive study by personal visits to all the large ports of the country (Test. 18). The witness testified deep interest in the proposed legislation which subsequently was enacted in the form of the Longshoremen's Act, and testified to correspondence with the appropriate committee of the House of Representatives. The witness testified from personal experience as to the basis upon which the compensation was paid before the change following the so-called *Gunther* decision (Test. 31). We believe that the statements and letters contained in pages 73 to 82, inclusive, of the Study, complained of by appellant on page 5 of his brief, are pertinent and admissable as showing the administrative interpretation placed upon 33 U. S. C. A. 910 from the inception of the Act until the *Gunther* decision.

Appellants on page 5 of their brief urge that as the tables contained in Employer's & Insurance Carrier's Exhibit 3 showed more than 15% of longshoremen

earned in excess of $1950.00 per year that that number would also work 300 days a year. The appellants overlook the fact that such high earnings men are in almost all cases especially skilled workers, receiving 10c or more an hour above the ordinary hold men such as Mr. Winkler or Mr. Diegnan, who are merely "extra-board" men (St. 29).

For example, take the first page of annual earnings of Seattle longshoremen (St. 30). Let us pick out the high earners.

No. 7	H. Carlson	$2353.71	hatch-tender
No. 12	O. Silow	2277.64	hatch-tender and foreman
No. 14	C. M. Dawson	2595.58	"extra-board" man and foreman
No. 29	T. Spanier	2387.57	"extra-board" man and foreman
No. 40	Tom Ness	2168.50	double-winch driver
No. 55	C. Richardson	2823.36	foreman
No. 64	G. Hendricks	2358.22	"extra-board" and foreman
No. 87	J. Nelson	2304.99	foreman

In every case the high earner is a man paid on a higher basis.

On page 6 the appellants summarize what they term the Findings of Fact made by the Deputy Commissioner. The appellants confuse *Findings of Fact* and *Conclusions* reached by the Deputy Commissioner. It is a fact that the claimant worked 182 days. Whether he worked at the employment of longshoring during "the whole of the year immediately preceding his in-

jury" is a conclusion which must be reached from a knowledge of the facts. Likewise, whether M. Dieg-nan is a longshoreman *of the same class* as the claimant is also a conclusion which the Deputy Commissioner reached and is not a finding of *fact* on his part. The distinction is important as appellants contend that the Commissioner's Conclusions are entitled to the same weight as his Findings of Fact. This, of course, is obviously unsound.

On page 7 of his brief, under the heading "Argument," appellants state that the allegation in the bill of complaint that the claimant worked "solely in the occupation of a longshoreman during substantially the whole of the year immediately preceding his injury" is in conflict with the Findings of Fact made by the Deputy Commissioner that he worked 182 days or parts of days and did not work at such employment during the whole of the year immediately preceding his injury. It will be noticed, however, that the Commissioner also found the following:

> "That during the year immediately preceding his injury the claimant was disabled by reason of illness for 10 days, but during the remainder of said period of following solely the employment of a longshoreman, reporting to the place of employment as frequently as required, being ready and willing to undertake and perform all the work as a longshoreman offered to him."

If 300 days is to be taken as a test of a longshore year it is obvious that Mr. Winkler did not work substantially the whole of the year; on the other hand, the

record in this case overwhelmingly shows that *Mr. Winkler worked substantially the entire part of a longshore year.* In the year immediately preceding his injury there is only one gap of 12 days. He, therefore, worked part of almost every week in the year.

We have no complaint of the authorities cited by appellants on page 8 and 9 of their brief, nor have we any complaint of the Commissioner's Findings of Fact in this case. It is to his *Conclusions* alone we take exception.

The appellants next urge, page 9 of their brief, that because Mr. Diegnan and Mr. Winkler were both hold men and were both "extra-board" men and were both engaged in the same general nature of work, that they are of the same "class" and that one is entitled to the same compensation in case of injury as the other. The same statement could be urged of any two doctors or two lawyers. Both may be competent and both anxious to obtain work, but we all know the amount of work which falls to each may widely differ. Innumerable elements enter into this fundamental difference in "earning capacities." Appellees contend that the sole question to be here determined is: *What is Mr. Winkler's earning capacity or power in the longshoring industry in the Port of Seattle?* The tables set out in the Study show astonishing graduations in earnings. These vary with the skill, experience, willingness to work, and the like, of the individual longshoreman and the amount, or rather lack of, employment which the industry offers (Test. 33).

On page 12 of their brief appellants presume that

Congress considered 300 days indicative of a longshoreman's working year and that, therefore, such a figure was set. This, we submit, is totally at variance with the facts. The Act was borrowed by the Congress of the United States bodily from the New York Act, and the section under discussion is almost word for word the same as the corresponding section in the New York Act. However, Congress in its wisdom also borrowed from the New York Act section (c), which avoids the rigidity of the two 300-day sections and applies a rule of common sense where the first two sections would lead to an unfair and unreasonable result. As indicated in the testimony (St. 4), the longshoring industry is of such a casual and intermittent character that little is known of earnings and such like of longshoremen, except in Northern Pacific Coast ports. If those closely connected with the industry are ignorant of those facts, certainly Congress could hardly have been legislating with the particular features of the industry in mind. Congress merely adopted a Compensation Act which had been quite successful in regular 6-day, 8-hour land industries and applied the Act to an off-shore industry, concerning the essential characteristics of which there was little information. However, the Act contains, fortunately, a safety valve in section (c) which appellees are now invoking.

Appellants discuss on pages 12 to 16 of their brief the *Gunther* decision which we have heretofore discussed. We, of course, agree that 182 days is not substantially a 300-day year. It is the contention of ap-

pellees, however, that 182 days may well constitute substantially the *whole of a longshore year* where the record shows the man to have worked a part of almost every week in the year, and consideration is given to the casual intermittent character of the work.

On page 16 of appellants' brief, and following, under the title "Fairness" appellants urge that application should be made to the legislature rather than the court to avoid the result of compensation in excess of two-thirds of earnings. It is not necessary to petition the legislature. The Act contains its own remedy and we are asking the court to affirm the lower court which applied that remedy. Appellants next urge that *actual earnings* may not fairly represent *earning capacity* under certain circumstances, such as for example; in the case of injury or illness. We have heretofore in this brief pointed out that such conditions are recognized and that we only contend that *actual earnings* are controlling when it is further shown that they *"fairly and reasonably" represent* an injured man's *earning capacity.* Appellants next refer (page 18 of appellants' brief) to appellees' contention that the result sought by them would lead to malingering. It is true, as stated on page 35 of the Testimony, that "malingering is frequently overstressed"; on the other hand, it is equally obvious that malingering is a necessary and important element to be considered. *It is obvious that a system which pays an injured man as much or more when he is laid up for injury as he makes when he is hard at work is not sound.*

On page 19 of their brief, under the title "Language

Clear", appellants urge that its contention must be upheld. Appellees also urge that the language is clear. If (a) and (b) lead to an unfair and reasonable result, such as the result which has heretofore been pointed out, then section (c) must be applied.

Appellants then criticize the District Court's opinion (appellants' brief, page 22), particularly the satement:

> "If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the basis of compensation."

The facts overwhelmingly show that the longshoring industry does not permit the ordinary longshoreman steady work during substantially the whole of the year. Certain men on account of skill, ability, desire to work and aggressiveness make quite high earnings and work quite a substantial number of days in the year, but the vast majority of the longshoremen fall far below 250 days per year and many fall below 200 days. As pointed out by the District Court the longshoring industry is not like factory work, where men work for a certain number of days a week between fixed hours. On the other hand, it is a casual employment depending upon ship arrivals and departures. As pointed out, the courts have frequently recognized this principle.

Appellants next criticize application of the rules laid down by the New York courts to interpret the Federal Act (Appellants' brief, page 24). As here-

tofore pointed out, two District Courts have judicially held what, of course, was widely known, that the Federal Act was borrowed bodily from the New York Act (appellees' brief, page 19). Although there are some exceptions to the general rule that an act so borrowed is accepted with the interpretation put upon it by the state from which it was borrowed, still there are no reasons in this case why the exceptions to the general rule should be put in effect. In each of the cases cited on pages 26 and 27 of appellants' brief, the court recognized the general rule stated above, but held on account of public policy or otherwise, that they would not follow the general rule. No sound reasoning has been pointed out why such an exception should here be made. It is true that none of the New York cases cited refer to longshoring. This is probably because of the fact pointed out on page 74 of the Study and referred to on page 28 of the Testimony that the Longshoremen's Union and the Employers' Associations on the Atlantic Coast agree upon a flat weekly compensation rate to be paid *in lieu of known earnings*, as longshore earning in other than certain Pacific Coast ports are unknown. Appellants point out on page 28 that some of the New York cases refer to seasonal work. This is true. As heretofore pointed out, however, many of the New York cases which apply (c) are not cases in which seasonal employment was involved, but where intermittent employment was involved. Appellants urge that "the ability of the workman to earn as a longshoreman in Seattle is only determined by the amount of work that he is given. The work is there, but the employers for

reasons of their own, see fit to employ other persons." This is not an accurate statement.

> "Q. Mr. Foisie, is it not true that a considerable proportion of the longshoremen in this port would be able to earn wages sufficient to justify the application of the maximum provision in the compensation law if the work were available to them?
>
> A. A considerable proportion, yes, with qualifications that will be obvious by reason of experience, skill, willingness to work, and the like.
>
> Q. Putting the question differently, the real reason why many of these workmen do not earn higher total wages during the year is the lack of employment as to many of them?
>
> A. Yes." (Test. 33)

Some men, like A. Zeppi, will work on one job in the day and will return to work another job at night. Most longshoremen, however, are not so industrious, nor do they wish to discommode themselves to this extent. This is illustrated in the following testimony:

> "Q. The greater portion of longshoremen in the ports are ready and willing to accept all the employment that they can obtain as longshoremen, a considerable proportion?
>
> A. I think I can say yes to both statements, not only a considerable proportion, but probably the greater proportion, but, of course, there are more than the usual number of human factors entering into such a question; willingness to work, yes, but to spend, as is involved in longshoring, the many hours waiting for work,

> especially in ports where work is de-casualized, or for these men in this port for whom the work is not de-casualized as fully as for gang men, but to say men are willing to take all work, it is rather difficult to say yes to that sort of a situation."

The situation is much the same as that of any man in any ordinary calling of life. There is a certain amount to be done in the world and the share that he himself will get of that work depends upon his skill, desire to work and many other factors too numerous to enumerate.

As stated by appellants (appellants' brief, pages 30-1), the lower court referred in its opinion in this case to cases and appellees have cited cases which refer to industries which did not continue during the entire year, such as coal mining. The longshoring industry continues the entire year, but the employment only furnishes intermittent work to the men. It is true that in the cases cited on the bottom of page 32 of appellants' brief there was no proof that any one individual worked substantially the whole of the year. In the instant case it is very strongly developed that only one man in the industry in 1929 worked 300 days and that the next highest men worked far below this figure. These are the exceptional men in the industry and the testimony clearly shows that the days worked by the average longshoreman during the year are far below the 300-day test.

On page 33 of their brief, appellants urge that some of the cases turned on the point that there was no proof of the daily wage of an employee of the same

class working substantially the entire preceding year. There is certainly no proof in this case of the daily wage of an employee of the same class working the entire preceding year. There is *no daily wage whatsoever in longshoring.* The tables show the extreme irregularity of the working day of a longshoreman, varying in the case of M. Diegnan from one to 15 hours a day (St. 16).

Appellants criticize (appellants' brief, page 33) the lower court commenting on statements of members of Congress and on the introduction of certain exhibits having to do with the construction of the Act. The Commissioner and the court are given considerable latitude under the terms of the Longshoremen's Act. 33 U. S. C. A. 933 provides that the Commissioner "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure." There is no suggestion that the testimony is not true and any light which can be thrown on the interpretation of the Act, we believe is thoroughly competent. We concur in the general rules on departmental construction referred to by appellants on pages 36 and 37 of their brief. We believe, however, that the administrative construction placed on the Act from the beginning with the express approval of the United States Employees' Compensation Commission itself is very helpful as tending to show the practical interpretation of the language used. Of course, the Department cannot overcome the plain terms of the statute. On the other hand, it is appellants' contention that the Act on its face is very explicit and in line with

the departmental construction. The Deputy Commissioner by an erroneous interpretation of the so-called *Gunther* decision has departed from the plain terms of the statute and from the correct administrative interpretation placed on the Act before that decision. On page 38 of their brief the appellants say:

> "In conclusion this appellant contends that in the final analysis, the question of his average wage becomes a question of fact. That the Courts cannot be expected in every case to review the mass of testimony and decide what conclusion shall be drawn therefrom."

This is true, but that result would not follow. There would certainly not be a mass of testimony for the court to review in every case. The question would be quite simple. The Commissioner would make a Finding of Fact in the individual case whether a longshoreman's actual earnings reasonably represented his "earning capacity;" if not, the Commissioner would find the sum which would reasonably represent that individual's "earning capacity" in the longshoring industry in the port in which he was employed. If his actual earnings failed to produce the result sought, then the earnings of fellow workmen in a similar earnings group would be taken by the Commissioner. His Finding of Fact on this question under the decisions cited on page 8 of appellants' brief, if supported by evidence, would be binding on the court.

The appellees believe that their contention in this case is overwhelmingly supported by legal authority and common sense. Appellants have cited no author-

ity or valid argument in support of their contention, and we respectfully request that the decree of the District Court be affirmed.

Respectfully submitted,

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